In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Chapter 13 Case
RANDALL S. DELOACH	)	
	)	Number 99-21047
Debtor	)	

ORDER ON OBJECTION TO CONFIRMATION OF GLENNVILLE BANK AND TRUST

Debtor's case was filed September 3, 1999. At that time, Debtor was obligated on Glennville Bank and Trust account number 26558, dated August 29, 1997, in the principal amount of $28,506.80. This account was secured by a mortgage on real estate, a mobile home, a Ford pickup truck, and by a co-signer, Marcus Deloach. Debtor was further obligated by virtue of a note dated December 9, 1997, Glennville Bank and Trust account number 27171, in the principal amount of $7,594.86, secured by the same real estate and mobile home. The latter note did not carry the endorsement or co-signature of Marcus Deloach.

Debtor's modified plan provided that Debtor would make post-petition payments to Glennville Bank and Trust on account number 26558 and that account number 27171 would be treated as unsecured and paid pro-rata because of a lack of any equity in

the collateral pledged on the earlier note to secure the subsequent indebtedness. The Bank objects to this provision, arguing that because account number 26558 is a co-signed obligation and account number 27171 is not, the provision as set forth in the debtor's plan, has the unfair effect of allocating all plan payments on the secured obligation to the note on which the Bank held, as additional security, the personal obligation of a co-maker.

There is no dispute that the physical collateral pledged to secure the earlier note, number 26558, is of a value sufficient only to fully secure the balance on that note. The Bank contends, however, that it was willing to advance the subsequent funds because it knew that the first note was co-signed by Marcus Deloach. Therefore, even though it did not obtain the personal obligation of the co-maker on the second note, it was relying on the existence and credit worthiness of the co-maker in making the subsequent extension of credit.

The Debtor contends that under the provisions of Georgia law, the Debtor has the right to designate the account to which voluntary payments are credited and that the creditor is required to apply the payments received in the manner designated. Thus, Debtor argues that, in the context of a Chapter 13 case, it may provide for the first payments under the plan to go to the co-signed obligation, which will result in that obligation being paid in full, resulting in a discharge of the co-maker with the subordinate debt being treated as an

unsecured note. *See* O.C.G.A. § 13-4-42; Waldrop v. Voiles, 201 Ga. App. 592, 411 S.E.2d 765 (Ga. Ct. App. 1991)(holding that if a debtor directs payments pursuant to O.C.G.A. 13-4-42, the creditor is obligated to apply the payments in accordance with this direction and has no authority to appropriate them in a different manner).

Creditor contends that the provision relied on is applicable only prior to default and that after default the Debtor loses the right to direct the application of payments. *Relying on* Atkins v. Citizens & Southern Nat'l Bank, 127 Ga. App. 348, 193 S.E.2d 187 (Ct. App. Ga. 1972).

Having reviewed the argument of counsel and citations of authority I conclude that the objection to confirmation should be overruled and that the plan can be confirmed as modified. A review of the Atkins case reveals that while the Court stated an exception from the general rule of Code Section 13-4-42 applied, it relied on specific language in the contract in reaching that conclusion in that the note specifically provided that the application of funds could be made "as the holder may from time to time elect." Atkins, 127 Ga. App. at 349, 193 S.E.2d at 188. In this case neither the note nor the deed to secure debt contain any such provision. When the note is silent, I conclude that the provisions of O.C.G.A. §13-4-42 control. That Code Section provides as follows:

> When a payment is made by a debtor to a creditor holding several demands against him, the debtor shall have the right to direct the claim to which it shall be appropriated. If the debtor fails to do so, the creditor shall have the right to appropriate the payment at his election. If neither party exercises the privilege, the law shall direct the application in such manner as shall be reasonable and equitable, both as to the parties and third persons, provided that, as a general rule, the oldest lien and the oldest item in an account shall be paid first, the presumption of law being that such is the intention of the parties.

If the Debtor's election controls, even post-default, then the plan is confirmable. If not, the Code provides that it is up to the Court to make that determination in a "reasonable and equitable" manner. It provides further that, in general, the oldest lien shall be deemed to be paid first. In this case the co-signed obligation is the older of the two notes and there is nothing in the record which suggests that the presumption of the law favoring this interpretation has been overcome. *See* Thompson v. Bank of Buckhead, 47 Ga. App. 767, 171 S.E.2d 465 (Ct. App. Ga. 1933)(stating that the oldest lien and the oldest item in an account will be first paid).

Because the Debtor was not restricted by the terms of the note in electing which account should be credited with payments first, and because of the presumption as to payment priority found in O.C.G.A. § 13-4-42, I hold that the objection is overruled and

the plan is confirmed.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of August, 2000.